IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1793

WINFIELD L. ROBERTS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL CAPITAL AREA CIVIL LIBERTIES UNION FOR LEAVE TO FILE, AND BRIEF *AMICI CURIAE*

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CIVIL LIBERTIES UNION FOR LEAVE
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The American Civil Liberties Union and the National Capital Area Civil Liberties Union respectfully move, pursuant to Rule 42, of this Court's Rules, for leave to file the within brief

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amici curiae. Although the Solicitor General has consented on behalf of the respondent to the filing of a brief amici curiae, counsel for petitioner has refused consent.*

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated to defending and preserving the civil liberties guaranteed by the Constitution. The National Capital Area is its affiliate operating in the District of Columbia.

Central to the procedural safeguards secured by The Bill of Rights is the Fifth Amendment, whose requirement of due process and privilege against self-incrimination lie at the core of our adversarial criminal

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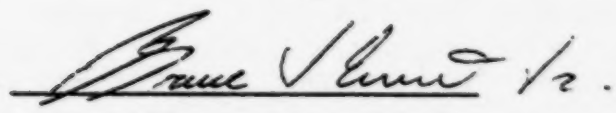
* Consent from the respondent is being lodged with the Clerk of the Court.

justice system. In our judgement, the decision below would significantly erode both of those Fifth Amendment rights.

The ACLU has frequently appeared in this Court arguing the continued vitality and importance of the Fifth Amendment rights at issue here, and we believe our experience can be of substantial assistance to the Court in this case. Moreover, we believe that this case can be resolved on a narrower ground than that presented by petitioner to the Court of Appeals, namely, that the trial court erred in drawing an inference of resistance to rehabilitation solely from the fact of non-cooperation.

To assist the Court's resolution of a case which again threatens crucial Fifth Amendment safeguards, we submit this brief amici curiae.

Respectfully submitted,



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November 15, 1979

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Interest of Amici Curiae

The interest of Amici Curiae appears in the foregoing motion.

STATEMENT OF THE CASE

Amici adopt and rely on the Statement of the Case in the Petition for a Writ of Certiorari, at 2-6.

SUMMARY OF ARGUMENT

The Due Process Clause forbids sentencing on the basis of inaccurate facts or assumptions, or on the basis of factors that are arbitrary and unrelated to the goals of sentencing. Petitioner was sentenced on the basis of an inference of resistance to rehabilitation drawn by the sentencing judge solely because of petitioner's refusal to cooperate with the prosecutor. However, that refusal could be explained by several other factors, such as fear of retaliation or exercise of the privilege against self-incrimination, which are equally as probable as the inference drawn by the Court, and are not permissible factors for sentencing. Moreover, the Court made no effort to determine whether the inference it drew was a reasonable inference. Accordingly, the sentence in this case was arbitrary and capricious, and the case should be remanded for re-consideration of sentence. (Point I.)

Even if the inference of resistance to rehabilitation were a reasonable inference to draw on this record, however, consideration of petitioner's failure to cooperate as an aggravating and determinative factor in sentencing would be improper, because it would impermissibly penalize exercise of his Fifth Amendment privilege against self-incrimination. Petitioner cannot be penalized for having done what the Constitution permits him to do - refuse to incriminate himself unl ss granted immunity from use of that testimony. Penalizing petitioner for non-cooperation was unnecessary (the immunity statutes provide a Congressionally-sanctioned method of obtaining cooperation), and unduly burdened the exercise of his Fifth Amendment rights. (Point II.)

Finally, even if the Court declines to

recognize a constitutional rule preventing consideration of unexplained non-cooperation as an aggravating and determinative factor in sentencing, it should exercise its supervisory power to prohibit federal courts from relying on such non-cooperation. Federal policy prevents federal judges from participating in plea bargaining discussions. Judicial reliance on non-cooperation transforms the prosecutorial bargaining chip of immunity into a judicial sword of increased sentence, which provides an unfair advantage to the state and renders the plea bargaining process unequal and unfair. (Point III.)

I. BECAUSE PETITIONER'S UNWILLINGNESS TO BECOME A GOVERNMENT INFORMANT WAS NOT, OF ITSELF, PROBATIVE OF HIS PROSPECTS FOR REHABILITATION, ITS CONSIDERATION AS AN AGGRAVATING AND CONTROLLING FACTOR IN FIXING HIS SENTENCE WAS ARBITRARY AND IN VIOLATION OF DUE PROCESS.

In order to remand for re-consideration of sentence the Court need not rule that a convicted defendant's refusal to become an informant can never be considered as a factor, or even as a controlling factor, in deciding that the defendant's prospects for rehabilitation are poor, and that the sentence which would otherwise be imposed should therefore be increased. The Court need only rule that a refusal to become an informant cannot, of itself, justify a conclusive inference of poor rehabilitative prospects, unless the sentencing judge has considered and rejected other equally plausible reasons for the refusal.

In United States v. Grayson, 438 U.S. 41, 48 (1978), Chief Justice Burger, writing for the majority, noted that indeterminate sentencing power carries with it the possibility of arbitrary exercise of otherwise broad discretion:

> Indeterminate sentencing under the rehabilitation model present[s] sentencing judges with a serious practical problem: how rationally to make the required predictions so as to avoid capricious and arbitrary sentences, which the newly conferred and broad discretion place[s] within the realm of possibility.

Petitioner's sentence was arbitrarily increased upon consideration of a factor - his refusal to tell the prosecutor the name of his narcotics supplier - that is unrelated to any of the purposes for which indeterminate sentencing authority is to be used.

Operating on the premise that "the punishment should fit the offender and not merely the crime," United States v. Grayson, supra, at 45, quoting Williams v. New York, 337 U.S. 241, 247 (1949), the goal of sentencing is to determine the likelihood that the offender will be reformed and rehabilitated.[1/] United States v. Grayson, supra, at 51. Although judges have broad discretion in sentencing, see Williams v. New York,

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1/ The gravity of the crime and the goal of deterrence are also factors to be considered in fixing sentence. However, the factor considered in this case, petitioner's refusal to supply information to the prosecutor, reflects on neither the gravity of the crime nor the concept of deterrence. The only remaining justification for considering that refusal as a factor is the possibility that it is probative of an individual's prospects for rehabilitation.

supra; United States v. Tucker, 404 U.S. 443, 46 (1972); Fed. R. Cr. P. 32(c)(2), that discretion is not without limits and is susceptible of abuse. 2/ See, e.g., Townsend v. Burke, 334 U.S. 736 (1948) (untrue assumptions concerning past criminal record improperly considered); United States v. Tucker, supra (consideration of convictions later determined to be constitutionally invalid); North Carolina v. Pearce, 395 U.S. 711 (1969) (exercise of the right to appeal

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2/ Judge Frankel makes this point in Criminal Sentences: Law Without Order (1973):

> Correctly understood, the "discretion" of judicial officers in our system is not a blank check for arbitrary fiat. It is an authority, within the law, to weigh and appraise diverse factors (lawfully knowable factors) and make a responsible judgment, undoubtedly with a measure of latitude and finality varying according to the nature and scope of the discretion conferred. But "discretionary" does not mean "unappealable." Discretion may be abused, and discretionary decisions may be reversed for abuse.

Id. at 84.

is an improper consideration).

The record below demonstrates that the district judge relied on petitioner's failure to cooperate and become a government informant as the controlling factor in the decision to impose maximum consecutive four year sentences. 3/ That is not in dispute.

3/ That the judge considered petitioner's non-cooperation of controlling significance is borne out by the colloquy which occurred at petitioner's sentencing hearing. First, in response to petitioner's attorney's request that the court adhere to its virtually unvarying practice of imposing concurrent sentences on the two telephone counts to which he pled guilty, the government argued for consecutive sentences. Pet. 14a. Thereafter, the government conceded the extraordinary nature of its request, but justified it on the basis of petitioner's refusal to cooperate and become an informant. Pet. 15a, 18a. The court clearly relied upon the lack of cooperation in fixing the sentence; it acceded to the government's request by imposing consecutive sentences, and expressly adopted the government's basis for its request by reproving petitioner for not cooperating. Pet. 20a. Lack of cooperation is again cited as a con-

(FN 3 continued on next page)

In its Brief in Opposition, the government agrees that the question presented is whether petitioner's failure to cooperate was properly considered. Opposition at 1. The first question raised by that consideration, putting aside for the moment the significant constitutional question raised by this use of sentencing power to induce a waiver of petitioner's Fifth Amendment right to remain silent, (see Point II, infra) is whether petitioner's failure to cooperate was, of itself, probative of his resistance to reform and rehabilitation. Because there are several understandable explanations for that refusal which are unrelated to petitioner's rehabilitative prospects, and are equally as plausible as the "resistance to rehabilitation" explanation suddenly seized upon without evidentiary support by the judge

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trolling factor in the district court's written memorandum denying bond pending appeal. Pet. 5.

and prosecutor, it was arbitrary for the court to infer from that refusal that petitioner was resistant to rehabilitation and therefore required the maximum sentence. 4/

4/ In the adjudicative context the Court has forbidden reliance on unreasonable inferences. At a minimum the Constitution requires a "rational connection between the fact proved and the ultimate fact presumed," a connection grounded in "common experience", and having "a reasonable relation to the circumstances of life as we know them." Tot v. United States, 319 U.S. 463, 67-8 (1943). See generally Leary v. United States, 395 U.S. 6, 36 (1969) (a presumption is irrational or arbitrary and hence unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend); County Clerk of Ulster County New York, v. Allen, No. 77-1554, 47 U.S.L.W. 4618, 24 (June 4, 1979) (same). Although somewhat different standards may apply to the admissibility of "evidence" in the sentencing phase, certainly due process requires at a minimum that a fact from which an inference of lack of rehabilitative desire is drawn be more likely than not probative of the existence of lack of rehabilitative desire. Nothing in the cases recognizing broad sentencing discretion for federal judges was intended to sanction arbitrary sentencing.

First, as other courts have recognized, by revealing the name of a narcotics supplier, the supplier's co-conspirators and the details of any conspiracies they are involved in, see Pet. 16a, petitioner would incur a serious risk of physical retaliation.5/

5/ See, e.g., DiGiovanni v. United States, 596 F.2d 74, 75 (2d Cir. 1979)("refusal to testify, particularly in narcotics cases, is more likely to be the result of well-founded fears of reprisal to the witness or his family"); United States v. Ramos, 572 F. 2d 360 (2d Cir. 1978)(fear of reprisal was the stated reason for refusing to cooperate). Judge Bazelon, dissenting below from the denial of rehearing en banc, observed that petitioner here had "cooperate[d] by inculpating both himself and his co-conspirator. [He] balked only when asked to identify his powerful suppliers, fearing that to do so would endanger his life. . ." Pet. 7a.

Both the Court and Congress have recognized the critical need for maintaining the anonymity of informers, precisely because of the substantial risk of physical retaliation to the informer and his family. See, e.g., McCray v. Illinois, 386 U.S. 300 (1967); Sher v. United States, 305 U.S. 251 (1938); Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 922, §§ 501 et. seq (1970) (Witness Protection Program). 6/

6/ See also Hearings on the Witness Protection Program before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 1st Sess., March 23, 1978.

Surely even the sternest judge of human nature would not test "rehabilitative desire" by demanding that a defendant become an informant where a concomittant of such action is a substantial risk to the informant and his family of retaliatory injury.

Refusal to become an informant may also result from an understandable desire, and constitutionally protected right, to refrain from giving the prosecutor information which may give rise to additional charges. See Malloy v. Hogan, 378 U.S. 1, 11 (1964). The prosecutor had not granted immunity, and petitioner had substantial reason to fear that the prosecutor intended to use whatever information cooperation might yield to bring additional charges against him. A defendant's exercise of rights secured by the Bill of Rights can hardly be considered

probative of resistance to rehabilitation or any other factor warranting increased sentence. Indeed, the Court has previously ruled that exercise of a different Fifth Amendment right is an impermissible consideration in sentencing. North Carolina v. Pearce, supra.

Even those courts permitting consideration of a failure to cooperate as evidence of poor rehabilitative prospects have generally done so only where the record showed that several other factors supported the inference, making it more probable than not. For example, in United States v. Miller, 589 F. 2d 1117, (1st Cir. 1978), cert. denied No. 78-966 (March 19, 1979), the First Circuit upheld the inference, but specifically reserved the case where, as here, nothing in the record or noted by the sentencing judge supported the inference that resistance to rehabilitation

was a more probable explanation for the failure to cooperate than were alternative explanations. Id. at 1137 n.18, 1139. See also United States v. Barnes, 604 F.2d 121 (2d Cir. 1979) (all factors bearing on a particular situation must be considered).7/

The government suggests that this case is governed by United States v. Grayson, supra, and that petitioner's refusal to cooperate is comparable to Grayson's perjury at trial. Opposition at 3. Willingness to lie at trial

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7/ In a related context the Court has determined that a defendant's motivation in refusing to give information after arrest is so "insolubly ambiguous" that it is "of little probative force" and cannot, of itself, be used to impeach his exculpatory testimony at trial. See United States v. Hale, 422 U.S. 171, 176 (1975); Doyle v. Ohio, 426 U.S. 610, 617 (1976). A refusal to become an informant is, of itself, no less ambiguous than post-arrest silence. Thus, it is no more probative of poor rehabilitative prospects than post-arrest silence is probative of guilt.

may be highly probative of a defendant's willingness to transgress further, and accordingly of rehabilitative prospects. United States v. Grayson, supra, at 50. The existence of past crimes may also be probative of future conduct. Williams v. New York, supra. But failure to cooperate, by itself, like materially false assumptions, tells a sentencing judge nothing about an individual's rehabilitative prospects and is therefore an arbitrary, inappropriate, and constitutionally impermissible basis for determining the period of incarceration necessary for rehabilitation. See Townsend v. Burke, supra, at 741 (sentencing based on materially false assumptions is impermissible); United States v. Tucker, supra (resentencing required to ensure that sentence would not have been different if court had known that

prior convictions were constitutionally invalid).

This Court has increasingly recognized the importance of sentencing, e.g., Mempha v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967), and particularly the importance of the accuracy of information used at sentencing. E.g., Williams v. New York, supra, at 244 (noting that the accuracy of the information relied upon was not challenged); Townsend v. Burke, supra, (sentencing on basis of untrue assumtions violates due process); Gardner v. Florida, 430 U.S. 349, 362 (1977) (imposition of death penalty on basis of information contained in a confidential pre-sentencing report improperly denied the opportunity to challenge the accuracy or materiality of the information).

The sentence at issue here, based on an inaccurate and improbable inference, is arbitrary and capricious, in violation of the Due Process Clause. Accordingly, consideration of petitioner's failure to become an informant as an aggravating and controlling factor in fixing his sentence requires a remand for resentencing. 8/

8/ Amici do not object to reliance on cooperation as a mitigating factor in sentencing. "It is one thing to extend leniency to a defendant who is willing to cooperate with the government, it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense." DiGiovanni v. United States, supra n.5, at 75, quoting from United States v. Ramos, supra n.5, at 363 n.2. Cf. Corbitt v. New Jersey, 439 U.S. 212 (1978) (extension of leniency in response to guilty plea does not violate the Constitution).

Petitioner should be resentenced under criteria relevant to his prospects for rehabilitation and reform, and not according to arbitrary criteria whose consideration is violative of the Due Process Clause. At a minimum, failure to cooperate should be an impermissible consideration unless the sentencing judge examines the reasons for not cooperating in order to determine whether failure to cooperate is indicative of resistance to reform or is the result of some other unblameworthy consideration, such as fear of reprisal, and to make a record for review on appeal. See DiGiovanni v. United States, supra n.5, at 78 (concurring opinion).

II. THE USE OF PETITIONER'S REFUSAL TO SUPPLY INFORMATION TO THE PROSECUTOR AS AN AGGRAVATING FACTOR IN FIXING HIS SENTENCE UNCONSTITUTIONALLY PENALIZED EXERCISE OF HIS FIFTH AMENDMENT PRIVILEGE.

Even if petitioner's refusal to supply information to the prosecutor could, of itself, be deemed probative of his prospects for rehabilitation, reliance on that refusal in fixing sentence would impermissibly penalize exercise of his constitutional right to remain silent.

Unlike United States v. Grayson, supra, where defendant had abused his constitutional privilege to testify in his own behalf by lying during his testmony, petitioner has simply used his Fifth Amendment privilege to remain silent. The basis for the prosecutor's unusual sentencing request was petitioner's refusal "to identify the persons

from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them." Pet. 16a. Because the prosecutor never extended immunity, there was no guarantee petitioner would not subsequently be indicted for other acts not encompassed in the plea agreement but revealed in answer to the prosecutor's questions. At least absent a grant of immunity, petitioner clearly had a constitutionally

protected right under the Fifth Amendment to refuse to "cooperate". 9/

9/ The Federal Immunity Statutes offer a means of securing cooperation other than by involving the judge in considering non-cooperation as an aggravating factor in sentencing. See 18 U.S.C. §§ 6001 et seq. (1976). In view of the prosecutor's determination not to offer immunity in this case (a failure by the government to avail itself of the congressionally indicated means of securing cooperation), a significant question is raised as to whether a judge may circumvent the purpose of this legislation by attempting to secure cooperation through sentence enhancement. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) (where Congress has indicated a means of dealing with a problem, the Court should be reluctant to condone the use of other non-statutory means of obtaining the same end).

Accordingly, the sentencing judge's express reliance on petitioner's refusal to answer this question as a controlling factor in determining sentence constituted the imposition of a penalty on petitioner for refusal to waive his Fifth Amendment rights. 10/ That penalty is inconsistent with holdings of this Court that exercise of the right to remain silent cannot be penalized. See

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10/ See DiGiovanni v. United States, supra n.5, at 75 ("while it is true that a defendant's lack of desire for rehabilitation may properly be considered in imposing sentence, to permit the sentencing judge to infer such lack of desire from a defendant's refusal to provide testimony would leave little force to the rule that a defendant may not be punished for exercising his right to remain silent"); United States v. Garcia, 544 F.2d 681, 685 (3d Cir. 1976) (consideration of refusal to supply information as a factor in sentencing put an impermissible "price tag" on exercise of the Fifth Amendment privilege); United States v. Rogers, 504 F.2d 1079, 84-5 (5th Cir. 1974) (same), cert. denied, 422 U.S. 1042 (1975).

Garrity v. New Jersey, 385 U.S. 493 (1967); Slochower v. Board of Education, 350 U.S. 551 (1956); Spevack v. Klein, 385 U.S. 511 (1967); Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, supra; Counselman v. Hitchcock, 142 U.S. 547 (1892); Gardner v. Broderick, 392 U.S. 273 (1968).

The Fifth Amendment privilege precludes the use of design or device to compel incriminating disclosures. See Miranda v. Arizona, 384 U.S. 436, 442-3 (1966). It guarantees the right to remain silent until an individual chooses to speak in the "unfettered exercise of his own will..." Malloy v. Hogan, supra, at 11. Thus, the Constitution forbids a prosecutor from commenting on a defendant's silence at trial. Griffin v. California, supra. And a defendant's post-arrest silence may not be used to impeach his exculpatory testimony

at trial. Doyle v. Ohio, supra n. 7. It follows, a fortiori, that the constitutional guarantee forbids a judge from increasing the sentence that would otherwise be imposed because of defendant's exercise of the right to remain silent, because the threat of an enhanced sentence is even more burdensome than these other pressures on the exercise of the Fifth Amendment right. If the two-fold increase in petitioner's sentence - from one to four years to two to eight years - is the result of his having done what the Fifth Amendment plainly allows, then petitioner has been the victim of an "inquisitorial system of criminal justice" in violation of the Fifth Amendment. Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964). The threat of increased sentence for non-cooperation impermissibly "fetters" exercise of the Fifth Amendment right by "making

its assertion costly. Griffin v. California, supra, at 614. It is therefore unconstitutional.

Although pressures which raise only a remote and de minimis possibility of discouraging the exercise of constitutional rights are not necessarily unconstitutional, see, e.g., Colten v. Kentucky, 407 U.S. 104 (1972) (risk of increased penalty at de novo trial in two-tier adjudicatory system does not violate due process); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (imposition of higher sentence by jury after appeal and retrial does not offend due process); Corbitt v. New Jersey, supra n.8 (statutory scheme requiring life imprisonment if convicted of first-degree murder after trial, with possibility of lesser penalty upon plea of non vult, not violative of due process); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (plea bargaining does not violate due process), if such pressures are likely to deter exercise of a

constitutional right, they are unconstitutional as an undue and unreasonable burden on the exercise of constitutional rights. Blackledge v. Perry, 417 U.S.21, 28 (1974) (indictment for higher charge on appeal in a two-tier system unconstitutionally deters exercise of the right to appeal); North Carolina v. Pearce, supra, at 724-5 (higher sentence after appeal and retrial, without indication of new facts to justify it, unconstitutionally chills exercise of the right to appeal). Moreover, where a particular form of pressure is unnecessary, it is excessive and therefore unconstitutional. United States v. Jackson, 390 U.S. 570, 582 (1968) (statutory scheme permitting death penalty only after jury trial unnecessarily penalized exercise of jury right). Cf. Corbitt v. New Jersey, supra n.8 (upholding penalty scheme which serves state interest in facilitating plea

bargaining without significantly deterring exercise of the right to plead not guilty). In this case the practice is both unnecessary and unreasonably burdensome on the exercise of one's right to remain silent.

That it is unnecessary is apparent from the variety of alternative indicia of an individual's prospects for rehabilitation available to the sentencing judge. See Williams v. New York, supra; Fed. R. Crim. P. 32(c)(2). See also "Guideline Evaluation Worksheet," 38 Fed. Reg. 31915 (1973) (factors to be considered before parole release). Family and work history, record of past convictions, psychological reports and demeanor all shed light on an individual's "life, health, habits, conduct and mental and moral propensities." Williams v. New York, supra, at 245. In view of the weak probative link between a failure to cooperate and resistance to rehabilitation, and in view of

the alternative valid indicia available, consideration of refusal to cooperate, at least in the absence of further exploration of the reasons for that refusal, is unnecessary. Like other governmental objectives, the goal of individualized sentencing "cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." See United States v. Jackson, supra, at 582; United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479 (1960).

III. EVEN IF IT DECLINES TO STRIKE DOWN THE PRACTICE ON CONSTITUTIONAL GROUNDS, THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO PROHIBIT FEDERAL COURTS FROM CONSIDERING NON-COOPERATION WITH THE PROSECUTOR, OF ITSELF, AS A DETERMINATIVE FACTOR IN FIXING A SENTENCE.

Apart from the strong constitutional claims advanced here, this case also presents an appropriate occasion for the exercise of this Court's supervisory power to establish standards of procedure for the federal courts. See McNabb v. United States 318 U.S. 332, 340 (1943); Cheff v. Schnackenberg, 384 U.S. 373 (1966).[11/] Supervisory power should be exercised here for two reasons. First, judicial consideration of a defendant's refusal

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11/ See generally Hill, "The Bill of Rights and the Supervisory Power," 69 Col. L. R. 193 (1969); Note, "The Judge-Made Supervisory Power of the Federal Courts," 53 Geo. L. J. 1050 (1965); Note, "The Supervisory Power of the Federal Courts," 76 Harv. L. Rev. 1656 (1963).

to cooperate constitutes sub rosa participation by the judge in the plea bargaining process forbidden by the strong policy of federal courts against such participation. Second, it gives an appearance of collusion between prosecutor and judge which taints both the public's and the defendant's belief in the fairness of the judicial process. Accordingly, even if the Court declines to rule, on constitutional grounds, that unexplained refusal to cooperate cannot be considered at sentencing, the Court should nevertheless formulate that rule for federal courts as a matter of supervisory power.

A. Judicial Participation in Plea Bargaining.

The Court has sustained plea bargaining against claims of illegality and improper administration on the rationale that a relative equality of bargaining power between prosecutor and defendant ensures its fairness.

See, e.g., Bordenkircher v. Hayes, supra, at 362; Santobello v. New York, 404 U.S. 257, 261 (1971); Brady v. United States, 397 U.S. 742, 751 n.8 (1970); Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting). In order to maintain this balance, federal judges are forbidden from participating in plea bargaining. See Fed. R. Crim. P. 11(e)(1) ("The court shall not participate in any such [plea agreement] discussions"); ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968), cited in Adv. Comm. Notes to Rule 11(e)(1), 18 U.S.C. §11, at 25; Scott v. United States, 419 F.2d 264, 273-4 (D.C. Cir. 1969) (trial judge should neither participate in plea bargaining nor create incentives for guilty pleas by a policy of differential sentencing). Judge Weinfeld has characterized the problem raised by judicial influence in the plea bargaining process as "a question of fundamental fairness":

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not.

United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966).

A defendant's ability to bargain is severely circumscribed if the courts consider non-cooperation as an aggravating factor justifying an enhanced sentence. The prosecutor need not offer as much for defendant's cooperation if the judge will consider any failure to cooperate as an aggravating factor justifying increased sentence. And defendant must accept less because the appearance of non-cooperativeness will be held against him by the judge in the sentencing phase.

Moreover, consideration of a refusal to supply the prosecution with information as an aggravating sentencing factor significantly distorts the plea bargaining process by eliminating the need for the prosecutor to trade immunity for the defendant's testimony, as this case shows. But Congress has determined that an offer of immunity by the prosecutor, not the prospect of increased sentence by the judge, is the appropriate way to secure testimony in the face of a valid Fifth Amendment claim.[12/] In addition, by acceding to the prosecutor's demand for an increased sentence because of petitioner's failure to cooperate, the judge rendered meaningless petitioner's agreement to plead guilty to specified charges in return for the dismissal of others, because the sentence was based upon defendant's refusal to

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12/ See supra n. 9.

provide information rather than upon the charges to which he pled guilty. The judge's action removed both of petitioner's "bargaining chips" - the ability to trade a plea of guilty in return for fewer charges, and the ability to trade testimony for a grant of immunity. Because this destruction of a defendant's bargaining power destroys the "mutuality of advantage" necessary to sustain plea bargaining against claims of unconstitutionality and unfairness, Bordenkircher v. Hayes, supra, at 362, the supervisory power should be exercised to prohibit a judge from considering a defendant's failure to cooperate with the prosecutor as a controlling factor in imposing sentence.

B. Appearance of Collusion Between Judge and Prosecutor.

Consideration of the failure to cooperate as an aggravating factor also gives the appear-

ance of collusion between prosecutor and judge in securing defendant's cooperation, contrary to the policy of Rule 11. The spectacle of the judge, wielding the sword of a threatened enhanced sentence against reluctant defendants, is at odds with the adversarial system, in which the judge should be a referee between parties of relatively equal bargaining power.

This Court's supervisory power is appropriately exercised to preserve fairness and the appearance of fairness in the judicial process. See, e.g., Mesarosh v. United States, 352 U.S. 1, 14 (1956); Note, "The Supervisory Power of the Federal Courts," 76 Harv. L. Rev. 1656, 59 (1963). The potential for unfairness and the appearance of unfairness arising out of the practice at issue here makes this an appropriate occasion for the exercise of supervisory authority to prescribe standards of procedure for the federal courts.

CONCLUSION

For the foregoing reasons, the judgement below should be vacated, and the case remanded for re-consideration of sentence.

Respectfully submitted,

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*Counsel wish to acknowledge the substantial assistance of Jed Ringel, a third year law student at New York University School of Law, in the research and preparation of this brief.